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(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.)

CRIMINAL APPEAL NO. 383 /1999

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973.

APPELLANT : (In Jail)

PREMRAM @ PREM,
S/o Shri Jairam Khadiya,
Aged about 30 years,
Occupation- Labourer, R/o village- Palepakhana Dumariya, Police Station Pharasabahar, District- Jashpurnagar (M.P.)

VERSUS

RESPONDENT :

The State of Madhya Pradesh
Through Police Station Pharasbahar
Tahsil- Kunkuri, District-Jashpurnagar

APR

(41)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.383 of 1999

Prem Ram @ Prem

Vs.

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
Sunil Kumar Sinha
Judge
15.01.2007

Hon'ble Shri Justice L.C. Bhadoo

Sd/-

(Acting Chief Justice
16th .01.2007

Post for Judgment: 17 01.2007

Sd/-
JUDGE
16 .01.2007

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.383 of 1999

Prem Ram @ Prem

Vs.

State of Chhattisgarh

Appearance:

Shri Gautam Khetra Pal, counsel for the appellant.

Shri Ashish Shukla, Additional Public Prosecutor, for the State.

DIVISION BENCH

HON'BLE SHRI L.C. BHADOO, Ag.C.J.
HON'BLE SHRI SUNIL KUMAR SINHA, J

JUDGMENT
(17.01.2007)

Following judgment of the Court was delivered by

Sunil Kumar Sinha, J.

(1) This appeal is directed against the judgment of conviction and order of sentence dated 03.12.1998 passed by the Additional Sessions Judge, Jashpur, in Sessions Trial No.125/1998 whereby the said Court held the appellant guilty of the offence punishable u/s 302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5000/-, in default of payment of fine, to further undergo simple imprisonment for 5 years.

(2) The brief facts are that the deceased namely Manpati Bai was the second wife of the appellant. She was daughter of Hero Ram Yadav (P.W.1). They were residents of the same village namely Palepakhna Dumariya. The accused has brought the second wife in the life time of his first wife, who was also residing

with him alongwith her two children. Initially the relations between the accused and the deceased were cordial, however, after some time, the accused started beating her and pressurizing her to leave his house and to go to her parents place. On 14.4.1998, the deceased had gone to the Sarpanch of the village namely Sitaram Paikra (P.W.6) and a complaint was reduced into writing by the Sarpanch on the instructions of the deceased that on 12.4.1998 at about 10 – 11 a.m., when the accused returned to the house, after picking *Mahua* fruits, he prepared and offered tea to the deceased, but the deceased saw that some black powder like substance was floating in the tea and she suspected that poison was mixed in it. On asking to the accused, the accused said that it is milk powder and he snatched the tea from her hand and threw it. The deceased saw that in the bottom of the glass of tea some residual part of alleged poisonous substance was there which she had shown to one Sukhal Sai. Thereafter, in the intervening night of 14th -15th of April, 1998 at about 2 a.m., the elder brother of the accused namely Dharam Khadia went to the house of father of the deceased and informed him that in the morning at about 2 a.m., his daughter (the deceased) has died on account of *Haiza*, vomitting & loose motions. Since the father of the deceased Hero Ram had seen the deceased hale and hearty just one day prior to the said information and there was some quarrel between the deceased and the accused on the said day, he doubted the information and he went to Sarpanch, Kotwar and other persons in the village including Bhadarsai Kanwar (P.W.4) and Bhim Yadav (P.W.2) and told them the story and all of them went to the house of the accused to see the dead body. When they reached to the house of

the accused they saw that the accused and other family members have kept the dead body inside a room and they have locked the room from out side and they were not allowing any person to see the dead body. Ultimately when much pressure was created by the villagers, then, at about 3 a.m., in the intervening night of 15-16th April 1998, they opened the door and allowed the villagers to see the body. On the next day i.e., 16.4.1998, the other persons also saw the dead body and thereafter the father of the deceased namely Hero Ram (P.W.1) lodged a *merg* intimation to the Police Station vide No.8/1998 (Ex.P.1) at about 8.30 a.m. After recording the merg intimation, the Investigating Officer M.S. Thakur (P.W.9) left for the scene of occurrence and reached there at about 11 a.m. on the same day. He prepared inquest on the body of the deceased under Ex.P-7 and sent the body for post mortem examination to Primary Health Center, Farsabahar, on the same day, on which Dr.(Smt.) Kiran Kerketta (P.W.7) conducted the autopsy on 17.4.1998 and prepared her report vide Ex.P-5. In the postmortem report, it revealed that the cause of death was Asphyxia due to throttling which was homicidal in nature. On the basis of such report, the Investigating Officer registered an offence vide Crime no.24/1998 on 24.4.1998 under Ex.P.8. After completion of the enquiry, the charge sheet was filed in the Court of C.J.M., Jashpur on 17.7.1998, who in turn committed the case to the Court of Sessions on 31.7.1998 and ultimately the case was received by the Addl. Sessions Judge on 24.9.1998, who conducted the trial.

(3) In order to establish the guilt of the accused appellant, the prosecution examined 9 witnesses and thereafter, the accused

appellant was examined u/s 313 Cr.P.C., who denied the material brought against him by the prosecution and ultimately pleaded that he had not assaulted the deceased and he only knows that the deceased was suffering from omitting and loose motions. He has not killed her and he has been falsely implicated. This is the only explanation offered by the accused.

(4) The learned Sessions Judge has based the conviction on the following circumstantial evidence:

(i) The accused appellant has brought the deceased as his second wife 3 years prior to the date of incident as they were in love and the deceased was residing as the wife of the appellant in his house;

(ii) The accused used to beat the deceased on account of quarrel between the two wives residing in his house;

(iii) Just two days prior to the date of incident, a quarrel took place between the accused and the deceased and the accused had tried to give poisonous tea to the deceased but the deceased had not taken that tea;

(iv) Even after trying that the deceased should leave house of the accused, she was residing in his house as his wife;

(v) The murder of the deceased took place inside the house of the accused by causing throttling and the dead body of the deceased was found inside the house of the accused and the accused and his other family members were canvassing in the village that the deceased had died on account of omitting and loose motions and *Haiza*;

(vi) The father of the deceased namely Hero Ram Yadav (P.W.1) and other villagers went to the house of the accused for seeing the body, but

they did not allow them to see the body as they had locked the room from out side, in which the body was kept. The dead body was lying there for about 24 hours and after a tremendous pressure made by the villagers, they could open the door at about 3 a.m. on 16.4.1998 and then only the body was seen by the father.

(vii) The dead body was found in suspicious condition and they were not explained either by the deceased or by the inmates of the house.

(5) Learned counsel for the appellant argued that the circumstances set forth by the prosecution and relied on by the trial court are not sufficient to hold the appellant guilty of the aforesaid offence and the trial Court committed an error of law by convicting the appellant under section 302 of I.P.C. and sentencing him to undergo imprisonment for life.

(6) On the other hand, learned State Counsel opposing the said arguments, supported the judgment passed by the trial Court.

(7) We have heard learned counsel for the parties at length and have also perused the records of the sessions trial.

(8) So far as the involvement of the accused in crime in question is concerned, there is no direct or ocular evidence and the whole case rests upon the circumstantial evidence. For resting conviction solely based upon the circumstantial evidence, the law laid down by the Apex Court in the matter of ***Dhananjoy Chhatterjee Vs. State of W.B. reported in (1994) 2 SCC 22*** is that :

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only

to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

(9) In the present case, the prosecution has tried to establish the involvement of the accused in Crime in question on the circumstances, referred to above, in Para-4. So far as these circumstances are concerned, it has been stated by the father of the deceased namely Hero Ram Yadav (P.W.1) that the accused had taken her daughter to his house on account of love between them, 3 years prior to the said information of hear death. Dharam (brother of accused) had told to him that the deceased had died due to vomiting and loose motions. On this information, he had gone to the house to see the deceased. When he reached there he saw that the appellant, his father and brother Dharam had locked their house and they did not allow to see the dead body of the deceased. The Sarpanch was also present there, to whom he reported this fact on which the Sarpanch said what can he do ? On this a Panchayat was conducted but in the Panchayat also the

family members of the appellant were not convinced and he was not allowed to see the dead body. On all this he went to the Police station and told the story to the Police and the Police said that firstly he should see the dead body and then only he should lodge the report. He returned back to village and thereafter on the next morning he again went to the house of the appellant alongwith Bhim and Sudan and then only he could see the dead body of the deceased. He deposed that he had seen injuries on her body. She has injuries on her neck and also on her both shoulders, cheeks, face and nose. Thereafter, he again went to the police station, told the entire story to them and lodged the report. He supported the contents of the report lodged by him. He specifically stated that he had not seen either the vomiting material or excreta near the body. The other witness Bhim Yadav (P.W.2) has also stated that he had seen the deceased hale and hearty just one day prior to the date of incident. Since she was the sister (cousin) of this witness he was told by the brother-in-law (Dewar) of the deceased namely Dharam Ram that the deceased had died out of vomiting, loose motion and *Haiza*. On this information, when he reached to the house of the appellant, he saw that Sarpanch etc., were holding meeting in his house and the appellant and his family members did not allow him to see the dead body. This meeting continued upto 4 p.m. in the evening but even after that, the villagers were not allowed to see the dead body. He stated that when the family members of the appellant did not allow them to see the dead body he suspected that they have killed her and if she has died out of loose motions and vomiting, there was no reason with the family members to not allow them to see the dead body. He has stated

that when he saw the dead body he had also seen the injuries on the body particularly on the neck and he had not seen the vomiting material or excreta near the body. He has supported the P.W.1 on material particulars. He has also said in the cross examination that there was some quarrel between the deceased and the appellant and the deceased reported the matter to Sarpanch. In the cross examination done by the defence, in paras 4 & 5, this witness has stated that the quarrel between the first wife of the appellant and the deceased most oftenly took place but after that both were residing in usual manner. Almost similar is the evidence recorded by P.W.3, Virendra Kumar, who also stated that he was not allowed to see the body by the family members of the appellant and in the village Panchayat, the appellant was saying that the Panchayat should decide the matter for which he will pay Rs.5000/- to them. He also stated that prior to the date of incident, he met the deceased and the deceased had said him that the appellant was pressing her to leave his house and when she resisted it, he had assaulted her on her right hand with a knife. The deceased had also told him that the appellant had given poison in her tea and on account of this, on Tuesday, she is calling a village Panchayat.

(10) P.W.4 Bhadarsai Kanwar and P.W.5 Sagar Sai Kanwar were declared hostile by the prosecution as they had not supported the case of prosecution. Another witness is P.W.6 Sitaram Paikra, who is the Sarpanch of village. He stated that in the month of March, the deceased came to Panchayat and made a complaint that the appellant is not willing to keep her and he gave her

poison by mixing the same in her tea. He specifically stated that the deceased died on the following intervening night of the day, on which, she made complaint. He further stated that the appellant alongwith a person had come to him and he has given information that the deceased died due to vomiting and loose motion. On hearing this, he had gone to the house of appellant alongwith Budhiaram Chowkidar, Nageshwar Sai, Up-Sarpanch and other members of village. He has stated that after seeing the dead body, he had sent the villagers to lodge the report to the Police Station on the next day and after arrival of the police to the village he went to see the dead body and he had noticed a black spot on the neck of the deceased. He further stated that the complaint which was given to him by the deceased, was handed over to the Police vide Ex.P-4. The said complaint of the deceased bears her thumb impression at portion "A" to "A". In the cross examination, this witness has stated that the complaint Ex.P.4 was reduced into writing by him on the instructions of deceased Manmati and she had put her thumb impression on it. He has denied the suggestion that the document does not bear the thumb impression of Manmati (deceased) and it was the thumb impression of some other person.

(11) Apart from the above evidence of witnesses, Dr. (Smt.) Kiran Kerketta (P.W.7) stated in her examination that she has conducted the autopsy on the body of the deceased on 17.4.1998 at about 10.00 a.m. and she found that the body was in the stage of putrification. Both eyes were closed and tongue was pressed in between the teeth. There was one abrasion on the lateral side of

the right wrist admeasuring 1 ½ cm x ½ cm, which was of about one week duration and was caused by hard and blunt object and was antemortem. There was clear impression on the right side of the neck about pressing of the neck by thumb, in the form of a bruise, admeasuring 3 cm x 1½ cm, and was transversely placed. There were also marks of two fingers (bruises) on the left side of the neck admeasuring 5 cm x 1 cm and were oblique downwards. There were impressions/marks of many fingers regarding pressing of neck. She had also marked cluster of finger marks (bruise) on the neck just beneath the lower jaw which were extended upto the corona thyroid (deeper portion of the neck). She has specifically stated that all these injuries were antemortem in nature. In the internal examination, she found that the soft tissues beneath above injuries were swollen due to pressure, left chamber of the heart was empty and right chamber was containing some blood. She has opined that the death was due to asphyxia as a result of throttling and was homicidal in nature.

(12) Nothing adverse could be brought against the evidence of above witnesses produced by the prosecution. On account of evidence given by the father of the deceased and her cousin brother, it is established that the deceased was living as the second wife of the appellant 3 years prior to the date of incident and some quarrel, most oftenly used to take place between them which the deceased had reported to the Panchayat and prior to the said incident, the Panchayat had handed over the deceased to the appellant and she was residing with him alongwith the other family members of the appellant. It is also established that just

one day prior to the date of incident, the appellant had offered tea to the deceased which according to the deceased was containing some poisonous substance, on which, she had denied to take the same and the appellant atonce snatched the tea and threw it, then the deceased could see that it was containing some block powder substance, on account of this, the deceased had met the Sarpanch and she has lodged a complaint to him which Sarpanch reduced into writing and the deceased made a thumb impression on it, but before the Panchayat could do any thing, this incident took place in the following intervening night of the date of complaint made to the Sarpanch. It is further established that after the death, the father of the deceased and other family members had gone to the house of the appellant but they did not allow them to see the dead body and even after Panchayat they could not see the dead body and ultimately after tremendous pressure, on the next day , they were allowed to see the body of deceased and then only, the report was lodged to the police, on which, the investigation commenced. Apart from this, the most important circumstance is about the conduct of the appellant and his family members who started canvassing in the village that the deceased died due to vomiting, loose motion and *Haiza*, but the postmortem report would show that she died on account of Asphyxia due to throttling and ultimately the homicidal death has been established on record by the evidence of the Doctor.

(13) Admittedly, the murder took place in the house of appellant, which was not at all explained by the appellant and his family members. The conduct of the appellant would show that he was

not able to raise a plausible, reasonable defence to show that the death of the deceased was not homicidal or if the same was homicidal then he was not responsible for the same. In his examination u/s 313 Cr.P.C., he has only offered this explanation that "he has not assaulted the deceased and he only knows that the deceased was suffering from vomiting and loose motions and he does not know anything. He is not guilty and he has been falsely implicated in this case". As per the provisions of section 106 of Indian Evidence Act, "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." Since the deceased was wife of the appellant and her presence in his house in alive condition in the fateful night was not denied by the appellant, therefore, in view of the above provisions, it was duty of the accused to give true and correct information to the police about the cause of death of the deceased and the circumstance in which the incident took place. By not explaining all these, on the contrary the appellant has offered an explanation that the deceased has died out of vomiting, loose motions and *Haiza* which was ultimately found to be false on the face of evidence on record, referred to above.

(14) In the facts and circumstances of this case, as per section 106 of the Evidence act, the burden was on the accused to explain how and in what circumstance the murder of his wife was committed. Merely remaining silent does not discharge the burden, which was on the accused. No doubt, in a criminal case, initially the prosecution was required to establish the ingredients of the offence and then burden shifts on the accused to discharge

his burden by cross examining the prosecution witnesses or by adducing his evidence to show that how the murder of deceased was committed. The prosecution was able to discharge its burden, whereas, the accused was not able to discharge his burden, which was on him, as per the provisions of section 106 of The Evidence Act. In this regard, the latest two judgments of Apex Court are important. In the matter of ***Trimukh Maroti Kirkan -vs- State of Maharashtra, 2006 AIR SCW 5300*** interpreting the provisions of section 106 of the Evidence Act, the Apex Court held as follows:

> "..... if an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Court. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. the burden would be of comparatively lighter character. In view of S.106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply

keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation. In case of no explanation or false explanation it would because an additional link in chain of circumstances."

(15) Further in the matter of State of ***Rajasthan Vs. Kashi Ram 2006 AIR SCW 5768*** while interpreting section 106 of the Evidence Act the Apex Court held that:

"Whether an inference ought to be drawn under Section 106 is a question which must be determined by reference to facts proved. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts. The respondent, accused having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by S.106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

The Court further held that:

".....The Principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have

discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in ***Naina Mohd's case reported in AIR 1960 Madras 218.***

(16) In the instant case, the accused has not thrown any light as to how the deceased was strangulated, how she received injuries and in what circumstances the incident took place. On the contrary, the accused had tried to give a wrong information to the villagers as well as to the Police to misled them and to show that the death of deceased was a normal death, which took place on account of vomiting, loose motions and ***Haiza*** and certainly this was with an intention to screen the offence committed by him.

(17) In view of the foregoing discussions, we are of the considered opinion that the prosecution has been able to establish the involvement of the accused in this crime beyond all reasonable doubts and the circumstances, referred to above in para 4 (supra) were fully established by the prosecution by cogent and reliable

evidence and the trial Court has rightly held the appellant guilty of offence punishable u/s 302 IPC as the circumstances, referred to above, lead to irresistible conclusion that the accused was the author of the crime and there was no possibility of innocence of the accused. There is no infirmity in the judgment passed by the trial Court warranting interference by this Court in this appeal.

(18) The appeal is devoid of merits, the same is liable to be dismissed and it is accordingly dismissed.

Sd/-
Acting Chief Justice

Sd/-
Sunil Kumar Sinha
Judge

Rao